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NO. 85-1671

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

AQUAMARINE OPERATORS, INC.,
Petitioner,

v.

IDA E. DOWNER,
Respondent.

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

1. Whether an award of prejudgment interest is appropriate when a Jones Act claim, joined with a general maritime law claim, is tried to a jury when no basis is provided in its answers to special issues for determining which portion of the damage award is attributable to the respective claims.

2. Whether an award of prejudgment interest is appropriate under the Jones Act and the general maritime law on elements of recovery which have not accrued as of the date of judgment.

3. Whether contributory negligence under the Jones Act and the general maritime law is solely a damage issue, as opposed to an issue of liability, thereby entitling a defaulting maritime litigant to establish such evidence in mitigation of damages.

4. Whether the application of a local rule of procedure, requiring that contributory negligence be affirmatively plead, deprives a defaulting maritime litigant of its federally created substantive right to establish evidence of contributory negligence in mitigation of damages under the Jones Act and the general maritime law.

RULE 28.1 LIST

Petitioner, Aquamarine Operators, Inc., has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

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To the Honorable Chief Justice and Associate Justices of The Supreme Court of the United States:

Petitioner, Aquamarine Operators, Inc., respectfully submits this reply[1] to respondent's brief in opposition and prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Texas.

1. EXCLUSIVE MARITIME REMEDIES

Perhaps the most glaring of the many misstatements and mischaracterizations contained in respondent's brief in opposition is the retrospective attempt to endow this case with state "flavor" by urging the existence of causes of action under the Texas Wrongful Death and Survival Statutes. Tex. Rev. Civ. Stat. Ann. art. 4671 *et seq.*, and art. 5525. Proclaiming to this Honorable Court that the "applicability" of these statutes "are not in issue" (Opp. p. 2) and that petitioner neither requested nor received a trial court ruling "as to which law controls [the] disposition of this case" (Opp. p. 3), nor "whether federal maritime law was [respondent's] exclusive ground of recovery" (Opp. p. 12, n.7), respondent fails to advise this Honorable Court, as she informed the trial court, that "[t]he parties stipulated *before trial* that federal maritime law governs this case" (Pet. p. 60a). Indeed, neither the Supreme Court of Texas, which recited that respondent brought suit "under the Jones Act and under admiralty law" (Pet. p. 1a), nor the Court of Appeals,[2] which

1. References to the Petition for Writ of Certiorari and the appendix thereto will be designated "Pet." followed by the appropriate page number. References to the Brief in Opposition and the appendix thereto will be designated "Opp." followed by the appropriate page number. References to the material contained in the appendix to this Reply Brief will be by the appropriate page number followed by the letter "a".

2. Of significant impact is respondent's "Statement of the Case" presented to the Court of Appeals which merely recited that "[s]uit was filed pursuant to the Jones Act (46 U.S.C. § 688) and the general maritime law"! (p. 1a).

recited that petitioner "brought a wrongful death action under the Jones Act and general maritime law" (Pet. p. 11a), viewed this case, in whole or in part, as one arising under Texas law.

Stipulations, and the obvious import of the lower court opinions, notwithstanding, the facts of this case mandate the exclusivity of the maritime remedies, as petitioner urged in its trial brief (p. 2a). Respondent's decedent, an able-bodied seaman aboard petitioner's vessel, drowned in Louisiana territorial waters while attempting to determine the extent of entanglement of a line which had fouled one of the vessel's propellers. Consequently, the Jones Act[3] is respondent's sole wrongful death and survival remedy against her decedent's employer based upon negligence, thereby preempting the application of analogous state remedies.[4] Similarly, the general maritime law wrongful death remedy created in *Moragne v. States Marine Lines, Inc.*,[5] and the survival action which has extended therefrom,[6] are respondent's sole remedies attributable to the alleged unseaworthiness of the involved vessel, similarly preempting the application of analogous state statutes.

Surely respondent's one line reference to the "Wrongful Death Act and the Survival Statute of the State of Texas" contained in her first amended original petition (Opp. p. D-2) does not circumvent or alter the maritime nature of this action, no more than respondent's erroneous reference to the Death on the High Seas Act[7] contained in the same petition (Opp. p. D-3) transforms this territorial water's incident into a high seas death! Respondent erron-

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3. 46 U.S.C. § 688.

4. *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964).

5. 398 U.S. 375 (1970).

6. *Hlodan v. Ohio Barge Lines, Inc.*, 611 F.2d 71 (5th Cir. 1980).

7. 46 U.S.C. § 761 *et seq.*

eously attributes unwarranted and unsupported dignity to a single previously forgotten allegation in an attempt to diminish the clear maritime nature of this case. Consequently, respondent's various eleventh hour attempts to weave Texas statutes into this case are without merit (Opp. p. 2, 3, 7 n.4, 12, 12 n.7).

2. CONTRIBUTORY NEGLIGENCE RULING: INADEQUATE GROUND OF DECISION

As previously urged by petitioner (Pet. p. 19-20), implicit in the Supreme Court of Texas' ruling (Pet. p. 9a) is the erroneous proposition that contributory negligence in a maritime case is a liability or fault issue, rather than a damage issue or, more precisely, an issue in mitigation thereof. Respondent does not address this proposition. Rather, respondent makes an *ex parte* determination of the *character* of the excluded evidence,[8] a

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8 Petitioner has never taken the position, as respondent has suggested (Opp. p. 6-8), that the mere voluntary nature of the decedent's actions constituted contributory negligence. However, his voluntary actions, coupled with the availability of a known alternative and the existence of a negligent act or omission following the voluntary action, entitled petitioner to establish such evidence. Indeed, even several of the authorities relied upon by respondent support this conclusion (Opp. p. 7, n.4). *McCoy v. United States,* 689 F.2d 1196, 1198 (4th Cir. 1982); *Joyce v. Atlantic Richfield Co.,* 651 F.2d 676, 682 (10th Cir. 1981); *Tolar v. Kinsman Marine Transit Co.,* 618 F.2d 1193, 1195-6 (6th Cir. 1980). Was the decedent contributorily negligent in making the dive knowing that a professional diver had been summoned? (Opp. p. E1-E3). Was the decedent contributorily negligent in insisting that he make the dive alone, although he previously decided with the mate of the vessel, William Ballou, that they make the dive together? (p. 6a). Was the decedent contributorily negligent in cutting his safety line within less than 10 to 15 (p. 8a), or 30 to 40 (p. 6a), seconds of voluntarily making the dive, rather than tugging on the safety line in the event of problems as previously decided? (p. 6a). Petitioner was entitled to a jury determination of these issues. The burden of proof for negligence under the Jones Act, characterized as "slight" and "featherweight", is reciprocal and applies with equal force to a showing of contributory negligence. *Alverez v. J. Ray McDermott & Co., Inc.,* 674 F.2d 1037, 1042-3 (5th Cir. 1982); *McBride v. Lofland Brothers Co.,* 422 F.2d 363, 365 (5th Cir. 1970).

determination *not* made by the Supreme Court of Texas (Pet. p. 9a), and concludes that the court's ruling is "adequate" since "the same result would have ensued" i.e. the evidence *would have been* excluded anyway (Opp. p. 7). Respondent thereby seeks to justify one error by urging another unaddressed error and thereby misapplies[9] one of this Honorable Court's tests for determining the adequacy of a nonfederal ground of decision. *Herb v. Pitcairn,* 325 U.S. 117, 125 (1945).

Additionally, respondent fails to challenge the other grounds of inadequacy previously presented by petitioner (Pet. p. 20-21). Those grounds, addressing the novelty of the ruling and the inconsistent and uneven application of the ruling, similarly prompt the conclusion that the ruling is inadequate. The uneven treatment which petitioner received in this case is further supported by the Supreme Court of Texas' failure to even discuss petitioner's assertion that it lacked jurisdiction to review abuses of discretion when that court had previously dismissed a case involving the identical issue for want of jurisdiction! *See Waquespack v. Halipoto,* 633 S.W.2d 628 (Tex. App.—Houston [14th Dist.] 1982, writ dism'd w.o.j.). This was the main issue upon which Ms. Downer's appeal to the Supreme Court of Texas was predicated. That forum refused to address this issue because to have done so would have compelled either a reversal of its recent action in *Waquespack* or a dismissal of the application for writ of error for want of jurisdiction.

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9. The erroneous view of maritime law to be corrected by this Honorable Court is simply that contributory negligence in maritime matters is a damage issue, *not* a liability or fault issue and, consequently, the striking of petitioner's answer and corresponding "admission" of liability, does not preclude it from mitigating its damages by establishing such evidence (*See* authorities cited in Pet. p. 23-25 and corresponding footnotes). Once corrected, the same judgment would *not* be rendered and, consequently, the ruling is inadequate.

3. CONTRIBUTORY NEGLIGENCE RULING: CONFLICTS

Respondent urges that there is "no procedural conflict" between Tex. R. Civ. P. 94 (Pet. p. 27a) and Fed. R. Civ. P. 8(c) (Pet. p. 26a) and thereby concludes that "the 'uniformity' of general maritime law litigation" is not affected (Opp. p. 8) by the erroneous exclusion of evidence. The existence of such a conflict was not urged to this Honorable Court by petitioner, either expressly or by realistic inference (Pet. p. 23-25).

While respondent feels compelled to raise issues not urged by petitioner, no mention is made of the cited opinion which *directly* conflicts with the Supreme Court of Texas' ruling. As in the trial court, respondent apparently attempts to distinguish that case by ignoring it![10]

Nor does respondent address the conflict in priciple previously raised by petitioner (Pet. p. 23-25), being satisfied with erroneously concluding that such a conflict does not justify consideration (Opp. p. 14). On the contrary, this Honorable Court has often granted certiorari based upon conflicts in principle.[11] Respondent simply confuses an honest presentation of the conflict[12] with a weak presentation of the conflict!

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10. *Singara v. F/V JO-ANN*, 1977 A.M.C. 875 (D. Mass. 1977), was strenuously urged by petitioner to the trial court as controlling (Pet. p. 34a), as it is an express holding that a *defaulting* maritime litigant is entitled to mitigate its damages by establishing evidence of contributory negligence.

11. *Oregon Dept. of Fish and Wildlife v. Klamath Tribe*, 105 S. Ct. 3420 (1985); *United States v. Nat'l Bank of Commerce*, 105 S. Ct. 2919 (1985); *Ivan Allen Co. v. United States*, 422 U.S. 617, 623-4 (1975).

12. The authorities previously urged by petitioner as conflicting in principle (Pet. p. 23-25) do not involve a defaulting litigant and, consequently, petitioner could not, in good faith, view these cases as directly in conflict with the instant case. *Compare Singara v. F/V JO-ANN*, 1977 A.M.C. 875 (D. Mass. 1977).

4. DISTORTIONS OF HOLDINGS AND RECORD

Respondent distorts various "holdings" of the Supreme Court of Texas. That court did not hold "that the evidence of *assumption of the risk* was properly excluded" (Opp. p. 4). Such a statement would have, by erroneous implication, addressed the *nature* of the excluded evidence. The court clearly referred to petitioner's tender as evidence of contributory negligence (Pet. p. 9a).

Nor did that court hold that petitioner "failed to properly raise, preserve and appeal its prejudgment interest complaint" (Opp. p. 4-5). The court merely concluded, without specifics, that what it erroneously perceived[13] as petitioner's prejudgment interest complaint had not been presented to the trial court and had therefore been waived (Pet. p. 10a). Thus, in light of the record in this case, the court obviously relied upon respondent's waiver argument which alleged the existence of differing theories of complaint (Pet. p. 83a-85a). Consequently, the disposition was not a mere application of the general procedural rule "that requires issues to be expressly, specifically and clearly presented" (Opp. p. 5), as respondent would have this Honorable Court believe at this late juncture.[14]

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13. This erroneous perception was fully discussed previously. *See* Pet. p. 6 and corresponding note 12.

14. In the Court of Appeals, respondent argued that petitioner "switch[ed] theories on appeal" and consequently the new, and allegedly different, theory was waived (Pet. p. 83a-85a), relying upon various authorities previously distinguished by petitioner (Pet. p. 10, n.22). In this Honorable Court, respondent makes no mention of these authorities and now attempts to rely on *Flaiz v. Moore*, 359 S.W.2d 872 (Tex. 1962), a case not previously cited. In *Flaiz* it was held that the mere mention of the residences of the parties and the place of the accident in a pleading does not raise the question of insufficient party contacts with the forum state, noting that the pleading "was properly regarded by the parties" as presenting a separate and distinct contention. *Id.* at 875.

Respondent similarly distorts the record in this case. Regarding petitioner's first prejudgment interest question, respondent urges that petitioner "now resurrects its 'joinder'[15] argument, which was the complaint made to the trial court", having allegedly abandoned this "argument" in the Court of Appeals (Opp. p. 9), but later states that the "prejudgment interest question (No. 1) was not raised in the state proceedings until Aquamarine filed its motion for rehearing"! (Opp. p. 17). Even a cursory review of petitioner's brief filed in the Court of Appeals (Pet. p. 80a-81a), however, discloses the identical language urged in question form to this Honorable Court. Similarly, a review of the former discloses the identical authority and analysis upon which petitioner relied in the trial court.[16] Thus, contrary to respondent's recitations, petitioner can "easily dispatch the matter with one record reference and a brief quote of that portion of the record" (Opp. p. 10).

Regarding petitioner's second prejudgment interest question, respondent urges that "(No. 2) . . . was not timely raised to the trial court" (Opp. p. 17) and "was never raised by Aquamarine until its motion for rehear-

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15. It is respondent, not petitioner, who has created these single phrase "arguments" such as "joinder" (Opp. p. 9), "election" (Pet. p. 84a) and "jury as fact-finder" (Opp. p. 9). Even a cursory review of *Barton v. Zapata Offshore Co.*, 397 F.Supp. 778 (E.D. La. 1975) and *Wyatt v. Penrod Drilling Co.*, 735 F.2d 951 (5th Cir. 1984) discloses the fallacy of respondent's attempt to segregate the various components of petitioner's complaint. The analysis and result in *both Barton and Wyatt*, as petitioner instructed the Court of Appeals (Pet. p. 79a) and the trial court (Pet. p. 47a), is not even triggered *unless* a Jones Act claim is *joined* with a general maritime law claim *and* both claims are tried to a *jury!*

16. As previously mentioned (Pet. p. 7-8), the analysis contained in *Barton v. Zapata Offshore Co.*, 397 F.Supp. 778 (E.D. La. 1975), relied upon by petitioner in the trial court (Pet. p. 47a, 53a), was subsequently adopted in *Wyatt v. Penrod Drilling Co.*, 735 F.2d 951 (5th Cir. 1984) which was strenuously urged by petitioner as controlling in the Court of Appeals (Pet. p. 81a).

ing in the Texas Supreme Court" (Opp. p. 8). Again, as with the first prejudgment interest question, the second was clearly raised in the trial court (Pet. p. 48a, 54a, 55a), as well as in the Court of Appeals (Pet. p. 80a, n.8). Consequently, it is properly brought forward to this Honorable Court.

Having been so successful creating confusion regarding prejudgment interest in the lower courts (Pet. p. 60a-66a; p. 83a-85a), it is apparent from the foregoing that respondent is attempting to utilize similar tactics in this Honorable Court. However, after almost two years of arguing to the contrary throughout the entire Texas court system, respondent finally concedes that petitioner raised the theory in the trial court, as announced in *Barton v. Zapata Offshore Co.*, 397 F.Supp. 778 (E.D. La. 1975) and *Wyatt v. Penrod Drilling Co.*, 735 F.2d 951 (5th Cir. 1984), although its raising is now characterized as "subtle" (Opp. p. 11). Rather than continuing to insist that the theory embodied on *Barton* and, subsequently, in *Wyatt*, was never raised in the trial court (Pet. p. 83a-85a), respondent now, for the first time, suggests that petitioner's reliance on *Barton* need not have been "caught" (Opp. p. 11) by the trial court since the reference was in "single spaced quotations" which were presented in "lengthy responsive pleadings" (Opp. p. 11). In effect, respondent urges that if a trial court fails to find an argument properly set forth in a pleading, no error occurs!

Furthermore, and contrary to respondent's suggestion in misplaced reliance upon Mr. Justice Harlan's dissenting opinion in *Henry v. Mississippi*, 379 U.S. 443, 463 (1965), the trial judge in the instant case was not required to "coax out of the arguments and imaginatively reframe" petitioner's prejudgment interest challenge. In-

deed, the trial judge was merely required *to read the cited opinion and apply the law as set forth therein.* The resolution of the issue required no more, yet petitioner received much less. The record speaks for itself, as does respondent's eleventh hour concession that the theory was presented.

5. ATTEMPTS TO LESSEN IMPORTANCE OF MARITIME QUESTIONS

Respondent's attempt to lessen the importance of the maritime questions presented by urging that "the issues . . . were not even discussed by the Court of Appeals or initially raised by Aquamarine in the Texas Supreme Court by cross-point or conditional application for writ of error" (Opp. p. 5), is without merit. The Court of Appeals reversed the trial court's imposition of discovery sanctions on two separate grounds and remanded the cause with instructions to reinstate petitioner's answer. Consequently, as the Court of Appeals instructed, "it [was] unnecessary to discuss the remaining points" (Pet. p. 21a). Having prevailed in the Court of Appeals, petitioner was neither compelled nor required to raise the unaddressed errors in the Supreme Court of Texas as previously discussed (Pet. p. 3, n.4,5). *Roark v. Allen,* 633 S.W.2d 804, 811 (Tex. 1982). This unique procedural posture, rather than the importance of the errors presented, readily disposes of respondent's contention.

Nor does respondent's continued attempt[17] to justify *all errors* on the basis of discovery sanctions lessen the importance of the maritime questions presented (Opp. p.

17. At one point, respondent actually argued that "[b]ecause of discovery sanctions, [petitioner's] liability for some amount of prejudgment interest was established"! *See* Reply Brief filed in the Court of Appeals, pg. 70. Respondent now argues that the erroneous prejudgment interest ruling should be "tempered" (Opp. p. 17) because discovery sanctions were imposed.

12, 13, 17). Respondent suggests, for the first time,[18] that the sole reason why the prospective deponents were noticed was to determine the basis for petitioner's contributory negligence allegation (Opp. p. 13) and, consequently, implies that the exclusion of the evidence, however erroneous, is justified for that reason. Respondent fails to mention, however, that *after* sanctions were imposed, she renoticed the deposition of both Clarke H. Ivins[19] and the "custodian of the entire personnel file for Edward Pierce Downer" and could have had, had she so desired, similarly renoticed the depositions of the remaining individuals who had been previously noticed. Clearly, respondent's prosecution strategy does not lessen the importance of the maritime questions presented.

CONCLUSION

Petitioner, Aquamarine Operators, Inc., respectfully requests that this Honorable Court grant its petition for writ of certiorari and proceed to the merits of the issues presented.

Respectfully submitted,

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18. Respondent presented the Court of Appeals with "five reasons" for affirming the contributory negligence ruling, none of which urged that petitioner had prevented respondent from determining "the basis for alleging contributory negligence" (Opp. p. 13).

19. The Supreme Court of Texas concluded that Clarke H. Ivins had been previously noticed (Pet. p. 4a-5a).

APPENDIX 1

Additional Excerpts from Reply Brief of Appellee filed in the Court of Appeals

EXCERPTS FROM REPLY BRIEF OF APPELLEE, IDA E. DOWNER. FILED: December 27, 1984 in the Court of Appeals for the Fourteenth Supreme Judicial District of Texas at Houston. MARY JANE SMART, Clerk.

* * * *

STATEMENT OF THE CASE

This appeal is from a judgment in favor of Plaintiff, Mrs. Ida E. Downer, individually and as executrix of the estate of Edward Pierce Downer, for the wrongful death of her husband. Mr. Downer was killed while working for Defendant Aquamarine Operators aboard the vessel M/V FOUR POINT IV. Suit was filed pursuant to the Jones Act (46 U.S.C. § 688) and the general maritime law, and Plaintiff also sued for punitive damages.

APPENDIX 2

Additional Excerpts from Trial Brief of Defendant, Aquamarine Operators

DEFENDANT'S TRIAL BRIEF. FILED: JUNE 8, 1984.
RAY HARDY, District Clerk, Harris County, Texas.
By T. English, Deputy.

* * * *

II. THE TEXAS WRONGFUL DEATH ACT AND SURVIVAL STATUTE OF THE STATE OF TEXAS ARE INAPPLICABLE TO THIS CASE SINCE THE PLAINTIFF'S CAUSE OF ACTION ARISES OUT OF AN ALLEGED MARITIME TORT

By reason of the evidence which will be introduced at trial, it will be absolutely uncontroverted that the Plaintiff was a member of the crew of the M/V FOUR POINT IV and was aboard her to assist in the management and navigation of the vessel. As such, the Plaintiff's decedent qualified as a seaman. The vessel, the M/V FOUR POINT IV, at the time of the accident was on the navigable waters of the United States and within the territorial waters of the State of Louisiana. Therefore, admiralty's interest in this claim and cause of action is substantially higher than that of the State of Texas and the remedies provided for under the Admiralty and General Maritime Law exclude items now recoverable under the Texas Wrongful Death Act and Survival Statute of the State of Texas so that the areas of law promulgated by both the statutes and common law of the State of Texas must be subordinated to the interests of admiralty where any conflict between the bodies of law may arise.

The Supreme Court of the United States has already explicitly addressed this issue in *Pope & Talbot v. Hawn,* 346 U.S. 406, 409 (1953), where the Court stated:

> ". . . [T]rue, Hawn was hurt inside Pennsylvania and ordinarily his rights would be determined by Pennsylvania law. But he was injured on navigable water while working on a ship to enable it to complete its loading for safe transportation of its cargo by water. Consequently, *the basis of Hawn's action is a maritime tort,* a type of action *which the Constitution has placed under national power to control 'its substantive as well as its procedural features. . . .'* " [cited omitted], (emphasis supplied).

Also, as the Supreme Court of the United States previously stated, ". . . 'every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or *navigable waters, is of admiralty cognizance.'* " *Atlantic Transport Co. v. Imbrovek,* 234 U.S. 52, 60 (1914).

The law is clear that the substantive admiralty law controls the issues to be litigated in this case since the cause of action asserted by the Plaintiff undoubtedly sounds from a maritime tort and, therefore, the application of Texas law is precluded.

The Plaintiff has also alleged a cause of action under the Death on the High Seas Act, 46 U.S.C. § 761 (West 1975). This cause of action is precluded as a matter of law inasmuch as the incident in question occurred within the state territorial waters of Louisiana at Morgan City. The Death on the High Seas Act provides explicitly as follows:

> Whenever the death of a person shall be caused by wrongful act, neglect or default occurring on the

> High Seas *beyond a marine league from the shore of any state,* or the District of Columbia, of the territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child or dependent relative against the vessel, person or corporation which would have been liable if death had not ensued. (emphasis added.)

46 U.S.C. § 761 (1975).

The evidence will clearly demonstrate that the incident in question occurred in Louisiana state territorial waters, less than one marine league from the shore. Therefore, the provisions of this chapter are inapplicable. Further, this Court is absolutely without jurisdiction to entertain an action brought under the Death on the High Seas Act since jurisdiction is vested exclusively in the district courts of the United States, sitting in admiralty. The language of the statute has been held to be mandatory in its nature, *Egan v. Donaldson Atlantic Line,* 37 F.Supp. 909 (S.D. N.Y. 1941).

Therefore, the only remedies available to the Plaintiff by virtue of the incident made the basis of this suit arise under the Jones Act, 46 U.S.C. § 688 and the General Maritime Law of the United States.

* * * *

APPENDIX 3

Excerpts from Defendant's Motion To Set Aside Interlocutory Default Judgment

DEFENDANT'S MOTION TO SET ASIDE INTERLOCUTORY DEFAULT JUDGMENT. FILED: December 9, 1983. RAY HARDY, District Clerk, Harris County, Texas. By P. Williams, Deputy.

* * * *

AFFIDAVIT

STATE OF TEXAS §
§
COUNTY OF GALVESTON §

KNOW ALL MEN BY THESE PRESENTS:

BEFORE ME, the undersigned authority, on this day personally appeared Chester Dalfrey, known to me to be a credible person of lawful age whose name is subscribed hereto, who, upon being duly sworn by me did depose and state as follows:

> My name is Chester Dalfry and I reside in Arnaudville, Louisiana, I am above the above [sic] of 21 years, I have personal knowledge of the facts to which I herein testify, I have never been convicted of a felony or crime involving moral turpitude and I know of no facts or circumstances which would disqualify me from giving oath or making this affidavit.
>
> I am the captain of the M/V FOUR POINT IV and have served in that position for over one year. I am licensed by the United States Coast Guard to captain ocean-going vessels up to 300 tons and have held this license for ten years.

I was the captain of the M/V FOUR POINT IV on August 7, 1982, the date on which Edward Downer accidentally drowned.

The M/V FOUR POINT IV is a twin screw, dual engine vessel, each engine having approximately 1,225 horsepower.

On August 7, 1982, the M/V FOUR POINT IV was to leave McDermott's docks in Morgan City, Louisiana, for the Cogniac Platform. At or about the time of departure, we noticed that a three inch mooring line had become entangled in the starboard screw of the vessel. The starboard engine was shut down and we then attempted to crank it a couple of times in order to free the line from the screw, but the line would not come loose. The remainder of the voyage was completed under power of the port engine only.

When we returned to Morgan City, Edward Downer, an able bodied seaman on board the M/V FOUR POINT IV for a period of eight months, and William Ballou, the mate on the M/V FOUR POINT IV, decided that they would go into the water and check to see how badly the rope was entangled in the starboard screw. During the ensuing discussions, Edward Downer insisted that he dive alone and indicated that he had done this type of diving on other previous occasions.

Thereafter, Edward Downer put on a diving mask which was on board the vessel and William Ballou tied a bowline around Edward Downer's belt. William Ballou and Edward Downer decided to communicate any problems with the dive by tugging on the rope. Then, Edward Downer dove off the starboard stern of the vessel. He was in the water approximately 30 - 40 seconds while William Ballou was holding the safety line which had been tied to Edward Downer's belt. The safety line then went slack and William Ballou began pulling the line.

When the end of the line was pulled on board the vessel, it looked like it had been cut. Approximately ten seconds later, Edward Downer surfaced about ten to fifteen feet from the vessel and William Ballou threw a line to him which landed across his body. Edward Downer made no effort to catch the line or grab on to it. He then went under again and that was the last time we saw him. At this juncture, two crewmembers, Don Doswell, an able bodied seaman on board the M/V FOUR POINT IV and William Ballou immediately went into the water to rescue Edward Downer. They dove under several times in an effort to find him. When these two crewmembers could not locate him, they re-boarded the vessel and a look-out was posted in the hope that Edward Downer would surface shortly. The sheriff's department was notified shortly thereafter.

As captain of the M/V FOUR POINT IV, I did not order or command Edward Downer to go into the water to check out the condition of the tangled mooring line in the starboard screw. Edward Downer volunteered to do the job and insisted that he be the one to do it since he had previous experience in doing this type of job.

Further, Affiant sayeth not.

/s/ CHESTER DALFREY
Chester Dalfrey

SUBSCRIBED AND SWORN TO BEFORE ME this 8th day of October, 1983.

/s/ PATRICIA L. ELLINGTON
Notary Public in and for
the State of T E X A S

My Commission Expires 5-24-86.

AFFIDAVIT

STATE OF TEXAS §
§
COUNTY OF GALVESTON §

KNOW ALL MEN BY THESE PRESENTS:

BEFORE ME, the undersigned authority, on this day personally appeared Clifford Joseph Cradeur, known to me to be a credible person of lawful age whose name is subscribed hereto, who, upon being duly sworn by me did depose and state as follows:

> My name is Clifford Joseph Cradeur and I reside in Morgan City, Louisiana. I am above the above [sic] of 21 years, I have never been convicted of a felony or crime involving moral turpitude, I have personal knowledge of the facts to which I herein testify and I know of no facts or circumstances which would disqualify me from giving oath or making this affidavit.
>
> On August 7, 1982, I was the winch operator on board the M/V FOUR POINT IV. I was on deck with William Ballou, the chief mate on the boat, and Edward Downer, an able bodied seaman on board the boat. Apparently, a mooring line had become entangled in the starboard screw and I was on deck with William Ballou and Edward Downer immediately prior to the time that Edward Downer decided to go into the water to check out the extent of the entanglement. William Ballou tied a safety line to Edward Downer and, after putting on a diving mask, he jumped into the water. Edward Downer was under water for ten or fifteen seconds when the line went slack. The chief mate than pulled the line in. Thereupon, we started looking for Edward Downer and he surfaced a little ways away

from the boat. At first he was facing away from the vessel and then he started to dog paddle towards the M/V FOUR POINT IV. William Ballou then threw a line to Edward Downer which landed across his head. About that time, he started to go down and two crewmembers jumped in after him, but could not find him.

Further, affiant sayeth not.

/s/ CLIFFORD JOSEPH CRADEUR
Clifford Joseph Cradeur

SUBSCRIBED AND SWORN TO before me this 8th day of October, 1983.

/s/ PATRICIA L. ELLINGTON
Notary Public in and for
the State of T E X A S

My Commission Expires 5-24-86.